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Supreme Court, U.S.
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No. 96-678

In The

Supreme Court of the United States

October Term, 1996

DAVID D. BENNETT,

Petitioner,

v.

LAW FIRM OF JONES, WALDO, HOLBROOK & McDONOUGH and CHRISTOPHER L. BURTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States. Petitioner David D. Bennett respectfully submits this reply brief in support of his Petition for Certiorari to review an unpublished Memorandum disposition of the Court of Appeals for the Ninth Circuit. The unpublished Memorandum "Affirmed as Construed" the power of a federal district court first to bar and then continue to restrict an opt out in bringing unlitigated claims against his former lawyers who also served as class counsel. The Affirmance implicitly empowered the federal court to police Mr. Bennett such that the Utah "litigation does not undermine [the] finality of [the] class action judgment." (App. 4.) The Memorandum also stated that the Utah court may examine the adequacy of the class settlement only insofar as the settlement sheds light on the Utah Lawyers' representation of Bennett. (App. 3.)

I. SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' affirmance of a federal district class court's jurisdiction over an opt out, raises compelling constitutional questions under the Fifth Amendment Due Process Clause, the First Amendment Free Speech and Redress Clause, and the Article III Case or Controversy Clause.[1] Yet, those questions were not directly addressed in the Respondents' (hereinafter "Utah Lawyers") Brief in Opposition to certiorari. Their failure to address the important constitutional and federal questions is a concession that the issues are substantial and warrant certiorari. *C.f. Wiener v. United States*, 357 U.S. 349, 351 n.* (1958). Further, the Utah Lawyers' and the lower court's misapplication of ancillary jurisdiction concepts to an opt out's unlitigated

[1] *See* Petition for Certiorari, pp. 10-15.

malpractice claims is itself sufficient to warrant certiorari.[2] Bringing a malpractice claim does not undermine the earlier class settlement and does not trigger ancillary federal jurisdiction.

Class actions and class action settlements are burgeoning[3] and so are abuses committed by lawyers ostensibly representing the class, but who fashion settlements primarily in their own self interests.[4] Until the case at bar, Rule 23(b)(3) individual class members were protected by Due Process and Rule 23(c)(2). Individual plaintiffs could either litigate the fairness of the settlement in the class action court,[5] or, as Mr. Bennett did, timely opt out and be free of the federal court entirely. Indeed, this concept of the right to opt out serves as the Due Process foundation for allowing class judgments to bind absent class members. *E.g., Phillips Petroleum Co. v.*

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[2] In determining whether sufficient reasons exist for granting certiorari, the United States Supreme Court focuses on whether the presented issues are of importance to the public as distinguished from the individual concerns of the litigants. *E.G., N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951).

[3] An example is the $4,225,070,000 proposed settlement in the *Silicon Gel Breast Implant Pros. Liabl. Litig.,* (N.D. Ala. (C. V. 92-10005)). In this action, approximately 14,300 class plaintiffs opted out of the class settlement.

[4] *See generally,* NEWBERG ON CLASS ACTIONS §§ 15.27, 15.31 (3d ed. 1992); *Millions For Us, Nothing For You,* N.Y. TIMES, Dec. 19, 1993, § 3, at 1.

[5] Contrary to the Suggestions found in pp. 4-5 of the Utah Lawyers' Brief in Opposition, after Bennett opted out, the class court did not adjudicate Bennett's malpractice complaints against the lawyers. At the fairness hearing, Bennett testified, "I'm here today to clarify that I am opting out." When Bennett asked if he could speak, the court responded: "Well, you've opted out. You have no standing to object to the settlement." Bennett replied, "No, just that I expect nothing from the settlement." Transcript of proceedings, August 26, 1992, p. 4, Ins. 5-6; p. 7, Ins. 16-18, 20-21. He also explicitly told the court that he "will not be pursuing [his] objections in this [the class court] forum." *Id.* p. 17, Ins. 2-3.

Shutts, 472 U.S. 797, 808-813 (1985). As hereinafter demonstrated, the lower courts' conclusion and the Utah Lawyers' argument that an opt out's state court malpractice lawsuit could, in some unexplained way, undermine a class settlement and justify jurisdiction over an opt out, is unprecedented. The ultimate consequence is to render meaningless the right to opt out and thereby destroy the Due Process basis underlying a class judgment in Rule 23(b)(3) cases.

Finally, contrary to the Utah Lawyers' assertions, the federal courts' interference in the state court litigation is not over. And the errors committed below were not de minimus or corrected by the reviewing courts. For these reasons and the reasons in Mr. Bennett's petition, certiorari should be granted to resolve the questions presented for review.

II. ARGUMENT

A. Whether A Federal Class Action Court Has Jurisdiction To Enter And Maintain A "Bar Order" Injunction Over An Opt Out's Malpractice Claims Against His Former Lawyers Is A Compelling Federal Question That Should Be Decided By This Court.

1. The Basis For Federal Jurisdiction Urged By The Utah Lawyers Has Never Before Been Applied To A Class Opt Out And His Individual Claims.

In his Petition for Certiorari, Mr. Bennett challenges the lower court's jurisdiction to enter and a "Bar Order" and the circuit court's Memorandum disposition that "Affirmed," as construed the prohibition of a class opt out from "initiating or maintaining any lawsuit" against the opt out's former lawyers "which in any way involves . . . counsel's legal services."

There are no other cases that grant jurisdiction to a federal class action court over a securities class opt out to bar and police the opt out's pleading of malpractice claims

against the lawyers who fashioned the class settlement. Lack of authority upholding the Utah Lawyers' position is not surprising given the constitutional rationale for allowing class action judgment as enunciated by this Court in *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Hansberry* explained that the class action is an equity invention to enable courts to proceed to a decree where the number of those interested in the litigation are too great to permit joinder. Absent class members are bound by the decree only so long as the named parties adequately represent the absent members and all members of the class have the same interests. 311 U.S. at 41. The *Shutts* court subsequently held that "due process requires at a minimum" that class plaintiffs be allowed to opt out and be free of the class litigation entirely. 472 U.S. at 812.

The interest Mr. Bennett has in obtaining compensation for the Utah Lawyers' breach of their retainer agreement with him, malpractice committed as to him, and the infliction of emotional distress upon him, is different than the interest the securities class members had in obtaining compensation from the securities class defendants. For these and other reasons, Mr. Bennett opted out of the class. Therefore, Due Process requires: (1) That Mr. Bennett's individual claims against the Utah Lawyers not be thwarted by the class settlement judgment; and (2) that Mr. Bennett be free of the Bar Order and interference of the district court. But, if certiorari is not granted, this Court will not meet the lower court's *denial and challenge* of the Due Process basis for allowing class judgments.

2. An Opt Out's Legal Malpractice Claims Do Not And Cannot Undermine A Class Settlement Judgment.

Although the Utah Lawyers repeatedly say that Mr. Bennett undermines the class action settlement, they wholly fail to explain how his individual malpractice claims can possibly do so. Neither did the courts below. Both sides concede that opt outs have no standing to bring claims on behalf of the

class. But, upon the ex parte receipt from the Utah Lawyers of the "draft complaint" marked "for discussion purposes only," the court became alarmed that Mr. Bennett might bring a class action against the lawyers and entered a Bar Order. Further, even if Mr. Bennett had standing to bring a class action against the Utah Lawyers, the court incorrectly assumed that such a suit would undermine the class settlement judgment. The Ninth Circuit has conclusively ruled that in a class settlement, res judicata and collateral estoppel do not bar a subsequent class member's suit for malpractice. *Durkin v. Shea & Gould,* 92 F.3d 1510 (9th Cir. 1996). Malpractice claims against lawyers who fashion the class settlement do not undermine the settlement judgment.

Thereafter, when the court was told the draft complaint was only what it said it was, a draft for discussion, and that Mr. Bennett would not file a class action, the Temporary Bar Order should have been dissolved and the federal class court's lack of jurisdiction recognized. That did not happen. The Temporary Bar Order was adopted word-for-word as the permanent injunction even though the draft complaint was never made part of the record. Finally, when Mr. Bennett filed his state court complaint pleading individual claims only, the lower court's claim of jurisdiction over him should have ended. Instead, Mr. Bennett, a Utah resident, was hauled down before the California federal court and found in contempt. Incredibly, the court struck over 100 paragraphs of relevant facts from Mr. Bennett's malpractice complaint. On appeal of the Bar Order, the Ninth Circuit should have found that the lower court did not have jurisdiction to enter the Bar Order or to police Mr. Bennett's pleadings. Instead, it noted that courts have jurisdiction to protect their judgments, failed to explain how Mr. Bennett's claims undermined the judgment, and concluded without analysis that the federal court had jurisdiction. (App. 2-3.)

That Mr. Bennett's claims could not undermine the class settlement is also demonstrated by the fact that Mr. Bennett's individual state court claims were never litigated in the class

proceeding.[6] Prior to approval of the settlement, Mr. Bennett opted out. Three years later, he filed his malpractice complaint in a Utah state court. A copy of the prayer for relief in the complaint actually filed by Mr. Bennett, and for which he was found in contempt of the Bar Order at issue, is attached as App. 59. The complaint alleges the Utah Lawyers breached the retainer agreement *with him alone;* breached their fiduciary duty *to him alone*; and intentionally inflicted emotional distress *upon him alone.* These claims were never made by Mr. Bennett or anyone else in the class settlement proceedings, nor were Mr. Bennett's claims litigated. The "Class Action Final Judgment of Dismissal with Prejudice" does not mention any claims against the lawyers who fashioned the settlement. More importantly, as set forth in the final judgment itself, absolutely *no claims* were litigated or adjudicated by the settlement.

> 3. The Stipulation and Settlement are not an admission by Defendants nor is this judgment a finding of the validity of any claims in the litigation or of any wrongdoing by them.
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> * * *
>
> [T]he stipulation . . . and any negotiations . . . related thereto . . . shall not be offered or received . . . in any court, administrative agency or other tribunal for any purpose whatsoever other

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[6] Bennett's malpractice claims also are not resolved in the Utah State Bar proceedings. The Utah Lawyers devote two pages of their brief describing their view of the State Bar proceedings in an apparent attempt to discredit Mr. Bennett and his father and to suggest that Bennett's claims have been presented and ruled upon. The Utah Lawyers' continuing attempt to subvert the state court process is condemned in the "Scope" provisions of the Utah Rules of Professional Conduct. It reads, "Violation of a rule shall not give rise to a cause of action nor should it create any presumption. . . . The Rules [of Professional Conduct] are designed to provide guidance to lawyers and provide a structure for regulating conduct through discipline agencies. They are not designed to be a basis for civil liability. Further, *the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."* (Emphasis added.)

> than to enforce the provisions of this judgment. . . . (App. 10.)

The judgment's instructions are consistent with overwhelming case law that a class settlement does not adjudicate claims. Res Judicata or collateral estoppel do not apply to opt outs. *E.g., In Re Corrugated Antitrust Litig.*, 756 F.2d 411, 418-19 (5th Cir. 1985); and see also the cases cited on page 16 of Mr. Bennett's Petition for Certiorari.

3. The Ninth Circuit Court's Unpublished Memorandum Decision Does Not Conform With The Anti-Injunction Act.

The Anti-Injunction Act should have barred the federal courts from claiming jurisdiction over Mr. Bennett and his individual claims. The Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Atlantic Coastline R.R. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 286 (1970). Because Mr. Bennett did not have class standing to attack the judgment and could not attack the class judgment, the district court had no jurisdiction or need "to protect or effectuate its judgments" as an exception to the Act. Consequently, the Ninth Circuit's unpublished decision does not conform to the Act.

4. A continuing Controversy Exists Because Mr. Bennett Is Not Free Of The Bar Order And The Class Court's Continuing Claim of Jurisdiction.

The Utah Lawyers wrongly claim that because Mr. Bennett is free to pursue his "individual claims," there is no Article III case or controversy for this Court to consider. At first glance, the assertion may appear correct. In affirming the Bar Order, the Ninth Circuit Panel held "that the Bar Order cannot be construed to prevent Mr. Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action, so long as such litigation does not undermine the finality of class

action judgment." Close examination reveals, however, that the Utah Lawyers used the Bar Order and will continue to use the Bar Order to prevent Mr. Bennett from litigating his individual claims and the issues of whether the lawyers obtained a good class settlement for Mr. Bennett and whether the Utah Lawyers competently represented Mr. Bennett while he was a client.

Crippling the Utah courts' examination of the fairness of the settlement or class counsels' behavior during the class proceedings obstructed Mr. Bennett's day in court, but assists the Utah Lawyers in wrongfully avoiding liabilities. Accordingly, the Utah Lawyers choose to consider Mr. Bennett bound by the Bar Order in a manner which *does* affect his right to pursue his individual claims in state court. In fact, at the insistence of the Utah Lawyers, the federal district court declared Mr. Bennett and his counsel in contempt for violating the Bar Order. The court stuck over 100 paragraphs of relevant facts alleging how the lawyers failed to adequately and reasonably represent Mr. Bennett. The foregoing occurred even though these issues, as they relate to Mr. Bennett's individual claims, were not litigated in the federal class action, and the district court should not prevent their litigation in a Utah state court. *See Durkin v. Shea & Gould,* 92 F.3d 1510, 1516-17 (9th Cir. 1996). But because of the lower courts' mistakes, Mr. Bennett has suffered, and continues to suffer, injury which can only be redressed by vacating the Bar Order. Thus, an Article III case or controversy will exist until the Bar Order is dissolved and the district court's role as a policeman over the state court litigation ends.

Furthermore, the Ninth Circuit erred in affirming the Bar Order regardless of how it construed the Bar Order. Accordingly, an Article III case or controversy exists as long as Mr. Bennett continues to be bound to *any* extent by the Bar Order.

B. The Unpublished Memorandum Disposition Of The Ninth Circuit Court Calls For Supervisory Review Of This Court Because: (1) The Memorandum Disposition Ignores Inherent Constitutional And Jurisdictional Issues Created By A District Court's Policing Of An Opt Out; (2) Accommodates District Court Errors, Mistakes And Misconduct; And (3) Is In Conflict With A Contemporaneously Published Decision Of Another Panel Of The Ninth Circuit.

The egregious errors committed below were not de minimus. No class member supported or authorized the Utah Lawyers' unnoticed ex parte actions and the lower court failed to comply with Rule 65 or 28 U.S.C. § 636(b)(1)(A) in issuing, years later, a Temporary Bar Order against an opt out in another state. As set forth in the Petition for Certiorari, these mistakes warranted de novo review by the Appellate Court. Instead, the Memorandum Disposition indicated no reflection on the inherent constitutional and jurisdictional issues. The Memorandum Disposition effectually countenanced the substantial misconduct below.[7]

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[7] In a Motion to Supplement the Record filed with the Ninth Circuit Court of Appeals on August 12, 1995, respondents' counsel revealed: "This appeal concerns the propriety of a Permanent Bar Order prohibiting Appellant David D. Bennett, a former class member in the lower court, from suing class counsel over the fairness and adequacy of a court-approved class action settlement. Class counsel sought a Permanent Bar Order from the United States District Court for the Southern District of California on receipt of a draft of a complaint from David Bennett's Utah counsel. Class counsel did not file the draft complaint with the motion for a bar order but rather offered to provide the Court with a copy of the draft complaint for *in camera* inspection. Prior to the September 6, 1995 hearing on the Permanent Bar Order, Judge Judith N. Keen **requested** Class Counsel to provide her with a copy of the draft complaint, with which Class Counsel complied." Prior to this submission to the Ninth Circuit, the so-called "draft complaint" was not in any court record. It was never filed in a federal or state court.

If the Memorandum Disposition is allowed to stand, it is fundamentally contrary to *Durkin v. Shea & Gould,* 92 F.3d 1510, 1515 (9th Cir. 1996) ("[T]he prior adjudication of the adequacy of a settlement does not collaterally estop a settlement party's legal malpractice claim challenging of the conduct of a party's lawyer.").

III. CONCLUSION

The Respondents' failure to address the inherent and compelling constitutional and jurisdictional issues raised by the lower courts' affirmance of a Bar Order and jurisdiction over a class opt out justifies certiorari. The never-before-applied-to-an-opt-out ancillary jurisdiction urged by the Respondents is an issue qualifying for certiorari. The uncorrected departures from the normal course of judicial proceedings cries out for certiorari. For these reasons and the reasons in Mr. Bennett's petition, certiorari should be granted.

Respectfully submitted this 20 day of January, 1997.

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(CONFIDENTIAL: not for publication or dissemination in any form – for discussion purposes only)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

STATE OF UTAH

DAVID D. BENNETT, for himself and for and on behalf of a class of persons consisting of all holders of the common stock of Gen-Probe Incorporated on October 27, 1989, as defined herein,

Plaintiff,

vs.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C., a Utah corporation, SIDNEY G. BAUCOM and CHRISTOPHER L. BURTON,

Defendants.

COMPLAINT

(Jury Trial Demanded)

Civil No.

Judge

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DAVID D. BENNETT, Plaintiff	:	PLAINTIFF'S SECOND AMENDED COMPLAINT
vs.	:	Civil No. 940908220
JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.; and CHRISTOPHER L. BURTON, Defendants	:	(Jury Trial Requested) Judge: Tyrone E. Medley

COMES NOW PLAINTIFF David D. Bennett before this Honorable Court, represented by and through his counsel of record, David L. Sanders, Esq., of the Law Offices of David L. Sanders, and R. Priya Seshachari, Esq.

of Taft Securities Litigation, Inc., and complains of Defendants as follows:

* * *

with multiple-claim contract and tort claims as enunciated in *Crookston v. Fire Ins. Exchange,* 817 P.2d. 789 (Utah 1991) and 860 P.2d. 937 (Utah 1993; and in Section 78-18-1 of the Utah Code. The statutory premise provides for a punitive recovery when the clear "acts and omissions of the tortfeasor are the result of willful and malicious conduct" or it is "conduct that manifests knowing and reckless indifference toward, and a disregard of, the rights of others."

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a jury trial of right in accordance with Rule 38 of the Utah Rules of Civil Procedure, and for the following relief:

1. A judgment declaring conduct of the Defendants to be in violation of law as set forth herein.

2. A judgment awarding Plaintiff compensation for his various contractual and tortious injuries and damages, and for mental and emotional distress inflicted on him as a result of the Defendants' breaches of contract, malpractice, breaches of attorney-client privilege, breach of fiduciary duties, abuse of process, malicious civil prosecution, wrongful enjoinder, and other unlawful conduct.

3. A judgment awarding Plaintiff exemplary punitive damages against each Defendant in accordance with Section 78-18-1 of the Utah Code and as a mandate

against client abuse and conflicting misrepresentation in the future.

4. A judgment awarding Plaintiff his counsels' fees and costs and expenses in accordance with Paragraph 19 of the Retainer Agreement with Jones, Waldo, Holbrook & McDonough and general law and equity.

5. A judgment awarding such other and further legal, equitable and declaratory relief as the Court deems just and proper.

DATED this 1st day of August, 1995.

Respectfully Submitted,

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